IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1075 OF 1994.

Freddy Xavier Misquitta
& ors. : Appellants.

versus

Edmund Felix Murzellow & Anr. : Respondents.

Mr.G.R.Rege with Mr.O.S.Parreira for the appellants.
None for the respondents.

CORAM : D.G.DESHPANDE,J.
DATED : 18th January 2005.

ORAL ORDER.

1. Heard advocate for the appellants. Nobody is present for the respondents though

served. Mr.John D'Souza and Mrs.Rita D'Souza were the husband and wife. They had two daughters Catherine and Martha. Appellants are the legal heirs of deceased Catherine and, the respondents are the legal heirs of deceased Martha. Deceased John held property described in para 2 of the judgment i.e.

(1) Land bearing City Survey No.2554 admeasuring 87.3 Sq.Mtrs. with a house thereon.

(2) Land bearing Survey No.213, Hissa No.42 CTS No.2482 admeasuring Five gunthas;

(3) Land bearing CTS No.2568 and 2569/3 Survey No.213, Hissa No.51 admeasuring Nine gunthas.

John died on 2nd November 1956. His wife Rita died on 25th July 1977. Martha filed a suit for declaration and partition in respect of 1/2 share because, according to her, she was entitled to 1/2 of the share in the said property. The suit was resisted by the present appellants on two grounds. Firstly, according to them, deceased

John had made a Will on 31.7.1955 bequeathing all his properties to Catherine. Therefore, according to the appellants, in view of the Will, neither Martha nor her heirs are entitled to any share in the property.

2. Alternatively or at the same time Catherine contended before the trial Court that her mother Rita had executed a Gift Deed i.e. a Registered Gift Deed Exhibit -2 dated 16th January 1970 and has gifted Rita's entire share in the property to Catherine. Therefore, in short, the appellants tried to contend that the original plaintiffs- respondents cannot get any share in the property. The trial Court rejected the contention of the appellants regarding first document i.e. the so called Will dated 31st July 1955 holding that it was not the Will. And so far as the Gift Deed is concerned, the trial Court came to the conclusion that since the gift deed covers the entire property which was more than the share of Rita, the Gift deed is invalid and void in its entirety. Therefore, the suit of the plaintiffs was decreed and, the plaintiffs were held to be entitled to 1/2 share in all the suit properties. It is this order that is

challenged by the present appellants in this appeal.

3. Counsel for the appellants showed me the original Will, which, after it was proved and exhibited in the Court, returned to the appellants and, the appellants handed over to me a typed copy of the same. Since the following part of the said document Exhibit 23 was pressed into service by the counsel for the appellants in support of his contention that this is a Will and since the valid execution and attestation has been proved by examining proper witness, the document Exhibit 23 should have been given effect to as a Will. The said portion is as under :-

> "All the property I have moveable and immoveable I hereby declare that should go to my daughter Mrs.Catherine Misquitta who is also prepared to look after me and my wife till death and undergo all the funeral and other expenses. From today the first August 1955 all the property I have and my house and the things in it are entirely in her charge. I cannot interfere with any of this property

> without her permission. My daughter has every right to object within the period of 15 to 20 days. I will transfer this property using the name of my daughter Mrs.Catherine Misquitta."

Mr.Rege contended that the aforesaid recitals in Exhibit 23 clearly show that it is a Will. It is difficult to accept his contention. Will has been defined in Section 2(h) of The Indian Succession Act as under :-

> "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

If the definition is applied to Exhibit 23 then it is clear that it is not a Will. Because it is on the date of execution of the document dated 31.7.1955 John D'Souza or Jav declared that he will have no interest in the property from the date of the said document and he cannot interfere with any of them without her permission. Will has to take effect after the death and, till the death the owner of the property i.e. the

testator remains absolute owner. Form the document Exhibit 23 it is clear that executor relinquished his right in the property from the date of document and did not defer bequeath till his death. This document is, therefore, not a Will and, the findings of the lower Court are not required to be interfered with. The appellants cannot claim exclusive rights in the property on the basis of document (Exhibit 23).

4. However, alternatively the case of the appellants was that under Exhibit 2 i.e. the Gift Deed dated 16th January 1970 Rita gifted the entire property to Catherine. The trial Court held that execution of such a gift deed covering entire property was beyond the power of deceased Rita because she could not be the owner of the entire property after the husband’s death. The parties are admittedly Christian. Section 33 of the Indian Succession Act lays down the Mode of Devolution of property and it provides that, when intestate has left any lineal descendants then one-thirds of his property go to his widow and two-thirds go to his lineal descendants. This section was cited by Mr.Rege when questioned in this regard. It will be clear from the aforesaid

provision, therefore, that when John died on 2nd November 1956 leaving behind his widow Rita and two daughters Catherine and Martha, Rita - his wife or widow got 1/3rd share in the property left by John, and two daughters, being lineal descendants got 1/3rd right each in the said property. In view of this legal position it is clear that on the date of document Exhibit 2 i.e. the gift deed dated 16th January 1970 Rita was entitled to 1/3rd share of John's property. Therefore, the said document could have been held to be valid to the extent of Rita's share in the property. In view of this legal position, what natural follows is that the gift has to be held valid in respect of 1/3rd share of Rita, who has gifted this share to Catherine under Section 33 of the Indian Succession Act. Catherine got 1/3rd share. Therefore, when the plaintiff's suit for partition was filled Catherine was entitled to 2/3rd share and Martha was entitled to 1/3rd share. This important aspects have not been taken into consideration by the trial Court. Therefore, the appeal has to be partly allowed. Hence the order :-

:ORDER:

The Appeal is partly allowed.

The judgment and decree of the trial Court is modified. It is declared that the plaintiffs i.e. the Respondents in this appeal are entitled to 1/3rd share in the suit property and, that the defendants - appellants in this appeal are entitled to 2/3rd share.

No order as to costs.

[D.G.DESHPANDE]

18/01/2005 JUDGE.